DECISION MEMORANDUM

TO: **COMMISSIONER KJELLANDER**
COMMISSIONER REDFORD
COMMISSIONER SMITH
COMMISSION SECRETARY
COMMISSION STAFF

FROM: **DON HOWELL**
DEPUTY ATTORNEY GENERAL

DATE: **FEBRUARY 4, 2013**

SUBJECT: **SWAGER FARMS AND DOUBLE B DAIRY'S MOTION TO DISMISS IDAHO POWER'S COMPLAINTS AND PETITIONS FOR DECLARATORY ORDERS FOR LACK OF SUBJECT MATTER JURISDICTION, CASE NOS. IPC-E-12-25 AND IPC-E-12-26**

On November 9 and 21, 2012, Idaho Power Company filed two separate "Complaints and Petitions for Declaratory Order" regarding two Power Purchase Agreements (PPAs) between itself and New Energy Two and New Energy Three, respectively. In the 12-25 case, Idaho Power alleges that New Energy Two's proposed anaerobic digester at Swager Farms failed to meet its scheduled commercial operation date of October 1, 2012. In the 12-26 case, Idaho Power alleges that New Energy Three's proposed anaerobic digester at the Double B Dairy did not meet its scheduled operation date of December 1, 2012. Idaho Power asserted in both complaints that the qualifying facilities (QFs) have "failed to take the necessary steps required to bring the facilit[ies] online and operational by the dates required in [their power purchase agreements (PPAs)] including, . . . failing to take steps required to secure the interconnection of [their] proposed facilit[ies] to Idaho Power's system." Complaints at 3.

On December 4, 2012, the Commission issued a Notice of the Complaints and Petitions and ordered the two complaints be consolidated into a single proceeding. Order No. 32692. The Commission also directed the Commission Secretary to serve copies of the complaints on the respondents. The Commission ordered that the respondents file their answer no later than December 27, 2012.

BACKGROUND

A. Interconnection

The background for these cases is taken primarily from the two complaints and is summarized below. In October 2009, New Energy Two and New Energy Three (collectively "New Energy") initiated discussions with Idaho Power to begin the interconnection process for two anaerobic digester projects to be located at Swager Farms and Double B Dairy.[1] Under PURPA, QFs are obligated to pay the costs of constructing the necessary interconnection facilities (or transmission upgrades) between the QF project and the purchasing utility's system. 18 C.F.R. § 292.308.[2] Initially each biogas project was projected to provide 1.2 MW of power to the utility.

In October 2009, New Energy submitted a small generator interconnection request to Idaho Power for each project. Both QF projects executed interconnection Facility Study Agreements with Idaho Power in late October 2009. Order No. 32692 at 2. Idaho Power subsequently prepared and submitted separate Study Reports for each project to New Energy.

In May 2010, Idaho Power and New Energy entered into two separate PPAs for each of the biogas projects. The PPAs contained avoided cost rates which were in effect prior to the issuance of Order No. 31025 (March 16, 2010), and contained 15-year operating terms. The scheduled commercial operation date (COD) for Swager Farms was October 1, 2012, and the COD for Double B was December 1, 2012. On July 1, 2010, the Commission approved the Swager Farms and the Double B Dairy PPAs in Order Nos. 32026 and 32027, respectively.

About the time Idaho Power submitted the PPAs for approval, Idaho Power and New Energy continued their discussions regarding interconnection. In January 2011, New Energy requested that the interconnection capacity for each of its projects be increased from 1.2 MW to 2.0 MW. The parties subsequently executed new Facility Study Agreements and Idaho Power then prepared a new Facility Study Report for each project. Drafts of the two Study Reports were provided to New Energy. In late April 2011, Idaho Power issued its final Facility Study Reports estimating that constructing the transmission interconnection for Swager Farms' 2 MW interconnection would cost approximately

[1] Double B subsequently authorized New Energy Three to act on its behalf in negotiating with Idaho Power.

[2] Typically the interconnection process has three primary steps. First, a QF submits a small generator interconnection (GI) request to the utility and the parties execute an Interconnection Facilities Study Agreement. Second, once the Study Agreement is executed, the utility prepares a GI "Study Report" outlining the necessary construction for interconnection. Finally, if the interconnection Study Report (including proposed routing, estimated costs, and a construction schedule) is acceptable to the QF, then the parties execute a "Generator Interconnection Agreement" (GIA) and the QF pays the utility so the utility can begin construction of the interconnection facilities.

$1.71 million.[3] Idaho Power's final Facility Study Report for Double B's 2.0 MW capacity estimated interconnection would cost approximately $376,000. In May 2011, New Energy advised Idaho Power that Exergy Development would be assisting New Energy with its two QF projects. Order No. 32692 at 3. The parties then had protracted discussions and communications leading up to Idaho Power preparing the draft "Generation Interconnection Agreements" (GIAs) for each QF.

On May 9, 2012, Idaho Power asserts that it sent a draft GIA to New Energy/Exergy for the Double B project and advised it that failure to submit all of the requested items and the executed GIA "will cause the Generator Interconnection request to have been deemed withdrawn." Double B Complaint at ¶ 49. On June 19, 2012, Idaho Power sent Double B a final GIA to be executed and returned to Idaho Power no later than July 20, or "your Generation Interconnection Application will be deemed withdrawn." *Id.* at ¶ 53. Idaho Power insists that the GIA was not returned and that Idaho Power subsequently issued a deficiency notice that the GIA has been deemed withdrawn and that the project has been removed from Idaho Power's interconnection queue. On August 28, 2012, Idaho Power refunded Exergy's interconnection deposit for the Double B project. *Id.* at ¶ 54-55.

On March 22, 2012, Idaho Power asserts it sent the draft GIA to Swager Farms. Swager Farms at ¶ 58. In April 2012, Exergy asked that Idaho Power "revisit" the interconnection at a lower capacity of 0.8 MW. *Id.* at ¶59. The parties executed a "Re-Study" Feasibility Study Agreement which estimated a cost of $225,000. *Id.* at ¶61. On September 14, 2012, Idaho Power states that it sent the final GIA to Swager Farms at the lower .8 MW interconnection. *Id.* at ¶ 66. Swager Farms at ¶ 66. The cover letter for the Swager Farms GIA noted that Idaho Power "must have the executed GIA and funding no later than October 1, 2012, in order to complete construction by [December 31, 2012]." *Id.* (emphasis added). Idaho Power alleges that Swager Farms did not execute the GIA.

A. Force Majeure

On September 28, 2012, Swager Farms and Double B provided a joint "Notice of Force Majeure" to Idaho Power. In accordance with Section 14 of their respective PPAs, the QF projects notified the utility that they could not perform under their respective Agreements because of "the occurrence of a Force Majeure event." Swager Complaint at Tab 56; Double B Complaint at Tab 36. More specifically, the QFs allege that the Commission's generic PURPA investigation (GNR-E-11-03) caused the force majeure event. More specifically, they insist that the Commission's investigation

[3] The final Study Report also noted that interconnection costs for the smaller 1.2 MW interconnection would cost approximately $575,000.

regarding the ownership of renewable energy credits (RECs) and the issue of "curtailment" caused lenders to be "unwilling to lend in Idaho pending the outcome of these proceedings." *Id.* Thus, with "no financing available, . . . it [is] impossible for [the QFs] to perform [their] obligation" under the PPAs. *Id.* at ¶ 4.[4]

THE COMPLAINTS AND PETITIONS

In its November 2012 Complaints and Petitions, Idaho Power requested that the Commission make several findings or take specific actions. In particular, the utility requested that the Commission find and declare:

1. That the Commission has jurisdiction "over the interpretation and enforcement of the [PPAs] and the GIA[s]";

2. That Exergy's "claim of force majeure does not . . . excuse [the QFs] failure to meet the amended Scheduled Operation Date for the [PPAs]";

3. That New Energy/Exergy have failed to place Swager Farms and Double B in service by their respective scheduled commercial operation dates of October 1, 2012, and December 1, 2012;

4. That Idaho Power may terminate the PPAs if Swager Farms and Double B failed to cure their defaults under their respective PPAs by December 30, 2012, and March 1, 2013;

5. That under the terms of the PPAs Idaho Power is entitled to an award of liquidated damages; and

6. Award any further relief to which Idaho Power is entitled.

Swager Farms Complaint at 37; Double B Complaint at 27-28.

NEW ENERGY'S MOTION TO DISMISS

On December 27, 2012, New Energy filed a timely "Motion to Dismiss for Lack of Subject Matter Jurisdiction." New Energy makes two primary arguments. First, based upon the opinions of the Idaho Supreme Court, New Energy maintains that the Commission does not possess the necessary jurisdiction to interpret and/or enforce contracts. *See* Motion at 6 *quoting Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977).

[4] The Notice also stated that if Idaho Power disputes this matter, the QF "reserves the right to submit the same to the Idaho Public Utilities Commission and/or pursue any resolution to which in may be entitled before the appropriate Idaho District Court, FERC and/or any other applicable tribunal or governing body." Swager Complaint Tab 56 *citing* PPA § 19.1.

Second, New Energy/Exergy argues neither it nor the underlying PPAs confer jurisdiction on the Commission. As evident in its Motion to Dismiss, New Energy asserts it has not consented to Commission jurisdiction. Motion at 11. New Energy's Motion to Dismiss is contained in your case notebook.

IDAHO POWER RESPONSE

On January 10, 2013, Idaho Power filed a response to the Motion to Dismiss. The utility argues that the Commission does have jurisdiction over this matter for two reasons. First, relying upon *McNeal v. Idaho PUC*, 142 Idaho 685, 132 P.3d 442 (2006), Idaho Power argues there are instances in which the Commission does have jurisdiction authority to interpret contracts. Response at 3.

Second, Idaho Power maintains that two provisions of the PPAs provide the Commission with jurisdiction over disputes arising from the PPAs. Response at 5. In particular, Idaho Power notes that paragraph 19.1 of the PPA provides that "All disputes related to or arising under this Agreement, including, but limited to, the interpretation of the terms and conditions of this Agreement, will be submitted to the Commission for resolution." Idaho Power also maintains that PURPA grants the Commission "jurisdiction over the implementation of PURPA." *Id.* at 7. Idaho Power's response is contained in your case notebook.

NEW ENERGY REPLY

On January 16, 2013, New Energy filed a reply to Idaho Power's response. New Energy takes issue with the points raised by Idaho Power. The reply is also contained in your case notebook.

COMMISSION DECISION

Based upon your review of the Motion to Dismiss, Idaho Power's response, and New Energy's reply, what is your decision regarding New Energy's Motion to Dismiss?

Don Howell
Deputy Attorney General

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